NO. 88-1102

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS,
Petitioners,

v.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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QUESTIONS PRESENTED

Petitioners instituted this suit alleging that their *ad valorem* real estate taxes were assessed on a proper basis, but that the remainder of the taxes throughout the Parish of Orleans, State of Louisiana, are not assessed at their fair market value, and accordingly, the tax imposed on their fair market value, and accordingly, the tax imposed on their property was null and void. The suit was dismissed on procedural grounds, raising two constitutional questions:

1. Does the State of Louisiana provide its ad valorem taxpayers with a "plain, adequate and complete remedy" to determine the validity of *ad valorem* taxes as required by the Due Process Clause of the Fourteenth Amendment to the United States Constitution?

2. Does the dismissal of this suit which raises constitutional questions, based on retroactive reliance on an appellate decision violate Petitioner's 'due process' rights?

LIST OF INTERESTED PARTIES

Westminster Management Corporation
LePavillon Hotel
Jerry Bilbe
Sheila B. Bellarie
Kathleen M. Bilbe
Mary D. Bilbe
Regent York Incorporated
New Orleans Diamond and Jewelry Wholesalers, Inc.
Turngemeinde Partnership in Commendam
Hartwig Moss Insurance Agency, Ltd
W. R. Zanes & Co. of La., Inc.
Bernos Investment Corporation
Six-O-One Julia Corporation
Aitkens Realty Co., Inc.
Commodore Thomas J. Lupo Enterprises
New Orleans Rivercenter
International Rivercenter
Garon and Brener
John C. Lovell, Jr.
J. A. Hoerner Co., Inc.
James M. Ber
Delta Theatres, Incorporated
Thomas D. Church
National Meat and Provision Co.
210 Baronne Street Limited Partnership
Canarles Realty Corp.
Killian L. Huger, Jr., et al
Dixie Art Supplies, Inc.
Place St. Charles, a Louisiana partnership
Joseph C. Canizaro Interests
Cliff Probst, Inc.
First National Bank of Commerce, Trustee (The Alon Trust)
MFG, Ltd. d/b/a Leo Fellman & Co., Realtors

LIST OF INTERESTED PARTIES (continued)

To the best of our knowledge and belief, there are no affiliations except the following:

International Rivercenter, a partnership *in commendam* -Santa Fe Pacific Realty Corporation, L. & N Investment Corporation, Hilton Hotels Corporation, and local individuals.

Place St. Charles, a partnership *in commendam* - local law firms and individuals, Fidinam (USA), Inc. and **DG Immobilien-Anlagegesellschaft Heinz Liebherr Verwaltungsgesellschaft mbH & Co. KG Objekt New Orleans,** a West German Limited Partnership.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

WESTMINSTER MANAGEMENT CORPORATION, ET ALS,

Petitioners,

V.

PAUL C. MITCHELL, JR., DIRECTOR OF FINANCE OF THE CITY OF NEW ORLEANS, AND ATTORNEY GENERAL WILLIAM J. GUSTE, JR., ATTORNEY GENERAL OF THE STATE OF LOUISIANA

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

OPINIONS BELOW

The opinions below consist of an unreported decision of the Louisiana 4th Circuit Court of Appeal dated November 2, 1987, Docket C-8656 (Appendix C), and the decision of the same court in the matter entitled *Westminster Management Corp., et al v. Mitchell, et al*, 525 So.2d 1171 (La. App. 4th Cir. 1988), (Appendix D), writs denied by the Louisiana Supreme Court, October 14, 1988 (Appendix E).

JURISDICTION

The jurisdiction of this court to review the judgment below rests on 28 U.S.C. § 1257(3).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

The following are the relevant portions of pertinent constitutional and statutory provisions.

FOURTEENTH AMENDMENT TO UNITED STATES CONSTITUTION

> No State shall make or enforce any law which shall abridge the privileges or immunitites of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Louisiana Constitution of 1974, Article VII, § 18 provides:

§ 18. Ad Valorem Taxes

> Section 18. (A) Assessments. Property subject to ad valorem taxation shall be listed on the assessment rolls at its assessed valuation, which, except as provided in Paragraph (C), shall be a percentage of its fair market value. The percentage of fair market value shall be uniform throughout the state upon the same class of property.

(B) Classification. The classifications of property subject to ad valorem taxation and the percentage of fair market value applicable to each classification for the purpose of determining assessed valuation are as follows:

Classifications		Percentages
1.	Land	10%
2.	Improvements for residential purposes	10%
3.	Other property	15%

* * *

(D) Valuation. Each assessor shall determine the fair market value of all property subject to taxation within his respective parish or district except public service properties, which shall be valued at fair market value by the Louisiana Tax Commission or its successor. Each assessor shall determine the use value of property which is to be so assessed under the provisions of Paragraph (C). Fair market value and use value of property shall be determined in accordance with criteria which shall be established by law and which shall apply uniformly throughout the state.

(E) Review. The *correctness* of assessments by the assessor shall be subject to review first by the parish governing authority, then by the Louisiana Tax Commission or its successor, and finally by the courts, all *in accordance with procedures established by law.*

La. R.S. 47:1998 provides (as edited by petitioners) as follows:

§ 1998. Judicial review; generally

A. Any taxpayer in the state dissatisfied with the action of the tax commission under the provisions of R.S. 47:1989, *shall have the right* to institute suit within thirty days of the decision of the tax commission in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located contesting the correctness of assessment. Any taxpayer who owns property assessed in more than one parish may institute this suit in either the district court for the parish where the tax commission is domiciled or the district court of any one of the parishes in which the property is located and assessed. Any taxpayer who has filed suit under this provision and whose taxes have become due shall pay said taxes under protest and shall cause to issue notice to the officer designated by law for the collection of such tax under the provisions of R.S. 47:2110(E). However, the portion of taxes that is not in dispute shall be paid without being made subject to the protest.

B. Any taxpayer in the state shall have the right to institute suit in either the district court for the parish where the tax commission is domiciled or the district court of the parish where the property is located, for the purpose of contesting the correctness or legality of any change in assessment made against the property under written instructions of the tax commission, pursuant to R.S. 47:1990, which suits must be instituted within thirty days after the date of the written instructions of the tax commission ordering the change. Any taxpayer in the state who has filed suit under these provisions and whose taxes have become due shall pay said taxes under protest and shall cause to issue a notice to the officer designated by law for the collection of such

tax under the provisions of R.S. 47:2110(E). However, the portion of taxes that is not in dispute shall be paid without being made subjected to the protest.

(Underscording ours.)

* * *

La. R.S. 47:2110 (emphasis added) provides as follows:

§ 2110. Suits to recover taxes paid under protest

A. No court of this state shall issue any process whatsoever to restrain the collection of an ad valorem tax imposed by the state, or by any political subdivision thereof, under authority granted to it by the legislature or by the constitution. Any person resisting the payment of any amount of tax found due, or the enforcement of any provision of the tax laws in relation thereto, shall pay the amount found due to the officer designated by law for the collection of such tax and shall give the officer notice at the time of payment of his intention to file suit for the recovery of such tax. Upon receipt of such notice, the amount so paid shall be segregated and held by the officer for a period of thirty days. If suit is filed within such time for the recovery of the tax, then that portion of the taxes paid that are in dispute shall be deemed as paid under protest and such amount shall be segregated and shall be further held pending the outcome of the suit. That portion of the taxes paid by the taxpayer to the officer which is not in dispute shall not be made subject to the protest. If the taxpayer prevails, the officer shall refund the amount to the tax-

Louisiana Revised Statutes will be cited thus, La. R.S. 47:1998.

payer with interest at the rate of two percent per annum for the period from the date such funds were received by the officer to the date of such refund. If the taxpayer does not prevail, the taxpayer shall be liable for the additional taxes together with interest at the rate of two percent per annum from the date the notice of intention to file suit for recovery of taxes was given to the officer until the date such taxes are paid.

B. The right to sue for recovery of a tax paid under protest as provided herein shall afford a legal remedy and right of action in any state or federal court having jurisdiction of the parties and subject matter for a full and complete adjudication of any and all questions arising in the enforcement of such right respecting the legality of any tax accrued or accruing or the method of enforcement thereof. In any such suit, service of process upon the officer designated by law for the collection of the tax shall be sufficient service, and he shall be the sole necessary and proper party defendant in any such suit.

* * *

D. *The right of action provided in this section shall be in addition to any rights elsewhere provided in this Sub-title, including R.S. 47:1998, affording taxpayers an opportunity to test the legality or correctness of their assessments or ad valorem taxes paid under protest before the courts of state.*

* * *

STATEMENT OF THE CASE

A. The System

At the time this action was instituted on February 26, 1987, the ad valorem tax system in New Orleans, Louisiana was substantially as follows:

The City of New Orleans, which comprises all of Orleans Parish, was and remains divided into seven assessment districts with an assessor for each district. This is unique in Louisiana, for each other parish has a single assessor. It is the obligation of the assessor to appraise the real estate in his geographical area at its fair market value; then a percentage is applied to this appraisal and the assessment is thus determined. The tax is calculated by multiplying the assessment by a millage which is set by the various tax recipient bodies.[1] This millage is uniform throughout the City.

The assessors are required to open their assessment rolls for examination by taxpayers on August 1 of each year.[2] A taxpayer who disputes the correctness of his assessor's assessment of his property may appeal to the Board of Review.[3] If the taxpayer is not granted relief by the Board of Review, the taxpayer may appeal to the Louisiana Tax Commission.[4]

Article VII, Section 18(E) of the Louisiana Constitution provides that if a taxpayer seeks to obtain a *correction* of his assessment, he must first appeal to the Board

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[1] See *Louisiana Constitution*, Article VII, § 18, *supra*.

[2] La. R.S. 47:1992.

[3] *Id.* In the City of New Orleans, it is the City Council which sits as a Board of Review.

[4] 4. La. R.S. 47:1989.

of Review, then to the Louisiana Tax Commission. Having exhausted those administrative remedies to obtain judicial review, the taxpayer may appeal to ". . .the courts, all in accordance with procedures established by law."[5]

Two procedures have been established by the State Legislature:

1. Under La. R.S. 47:1998, a taxpayer may appeal to the courts ". . .within thirty days of the decision of the tax commission. . ."

2. La. R.S. 47:2110 provides a right to sue for recovery of a tax paid under protest, which "right of action provided in this section shall be in addition to any rights elsewhere provided in this Sub-title, ... to test *the legality or correctness* of their assessments or *ad valorem* taxes paid under protest before the courts of state."

In *Churchill Farms, Inc. v. Louisiana Tax Commission*, 338 So.2d 963 (La. App. 4th Cir. 1976), the Court held that La. R.S. 47:2110 provided the "plain, adequate and complete" remedy for a taxpayer to contest taxes levied against its property.

B. Petitioner's Action

Petitioners paid their taxes under protest, and pursuant to La. R.S. 47:2110, timely filed these proceedings, contending that although the assessments on their properties substantally met the standard of fair market value as required by the Louisiana tax system, i.e., their *assessor's* assessments were correct, their real estate taxes were nevertheless null and void and invalid for the reason that

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[5] *Louisiana Constitution*, Article VII, *supra*, Section 18(E), last phrase.

the remainder of the assessors throughout the City failed to meet the statutory requirements of assessing property according to the prescribed standards. Therefore, the petitioners were not afforded "equal protection of the law" and were entitled to have their taxes declared invalid, and to recover whatever relief was afforded them, predicating this action on *Siou City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923) and its progeny.[6]

The petitioners at no time alleged that their assessments were "incorrect". To the contrary, certain of petitioners appealed to the Board of Review, alleging that the manner in which the tax statutes were applied deprived of "equal protection of the law." Petitioners attempted to prevail upon the Board of Review to apply a reduction of their assessments consistent with *Sioux City,* under which they were entitled to equal protection of the law. Certain of petitioners appealed to the Louisiana Tax Commission on the same bases, that is, confirming the correctness of their assessor's assessments, but seeking *Sioux City* relief because of inconsistent assessment practices elsewhere in the City.

C. The LOWREY CASE

On June 26, 1987, which was months after petitioners filed this suit, the Louisiana Third Circuit Court of Appeal decided *Lowrey Chevrolet, Inc. v. Brumley,* 510 So.2d 1294 (La. App. 3rd Cir. 1987),[7] holding Lowrey's action alleging that its taxes were improperly assessed was for the "correctness" of the assessment and must be brought under La. R.S. 47:1998.

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[6] Petition and Amended Petition, Appendix A and B.

[7] This decision is dully set out in Appendix F.

Based upon this decision rendered *after* this suit was filed, respondents successfully moved for the dismissal of this action, the court below holding that petitioners' action was to determine the "correctness", not the "legality" of assessments, and should have been instituted within thirty days of the decision of the Louisiana Tax Commission, pursuant to La. R.S. 47:1998, and that there was no action available to petitioners under La. R.S. 47:2110.

From the outset of these proceedings, petitioners have contended that this action does not attack the constitutionality *of the statute* itself, *but its application*, and therefore, attacks the "legality" of the assessment system, and not the correctness of thier assessor's actions, and accordingly, proceeding under La. R.S. 47:2110 was proper.

This dichotomy precipitates the "Questions Presented" by this application for writs:

If when this suit was filed, there was such ambiguity in the statutory scheme requiring the intervening *Lowrey* decision to define the remedy available to a taxpayer, has Louisiana met the constitutional mandate to provide a "plain, adequate and complete" remedy?

Should petitioners be deprived of a hearing on the merits of their "lack of equal protection" claim based on the retroactive application of a decision defining rights under the legislative shceme defining taxpayers' rights to judicial access?"

ARGUMENT

It has been common knowledge for some time that the administration of the Louisiana tax system has not been in compliance with its legislative requirements, or the

standards set by the supervising Lousiana Tax Commission.[8]

This suit was instituted by these petitioners for the sole purpose of utilizing the tools available to them in an attempt to rectify this situation.

FEDERAL PRINCIPLES

That a statute may be constitutional on its face, but administered in such a manner as to violate the Due Process Clause of the Fourteenth Amendment as well as the Equal Protection Clause of the Fourteenth Amendment, is a principle long-established by the federal jurisprudence. *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). This basic tenet has been consistently applied by this Court in the context of uniform taxation as early as *Sunday Lake Iron Co. v. Wakefield TP,* 247 U.S. 350 (1918) and *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441 (1923), and now their progeny, and is presently subject to review before this Court in the consolidated cases of *East Kentucky Energy Corp. v. County Commissioner of Webster County* (Docket No. 87-1310) and *Allegheny Pittsburgh Coal Co. v. County Commissioner of Webster County, West Virginia* (Docket No. 87-1303).

LOUISIANA BASIC PRINCIPLES

Following the guidelines of *Yick Wo, Sunday Lake,* and *Sioux City,* Louisiana jurisprudence has recognized and applied the basic principle that its statutes may be administered in an unconstitutional manner, and has applied

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[8] Although in another context, the three judge federal court in *Scarnato v. Parker,* 415 F.Supp. 272 (M.D. La. 1976), so recognized, and in the same year, the Louisiana Court of Appeal in *Probst v. City of New Orleans,* 325 So.2d 665 (La. App. 4th Cir. 1976, 337 So.2d 1081), enunciated the same concept.

this concept in the context of determining the validity of ad valorem taxation. *Dixon v. Flournoy,* 176 So.2d 138 (La. 1965) (citing *Soux City, et als,* in footnote p. 140); *Bussie v. Long,* 286 So.2d 689 (La. App. 1st Cir. 1974); *Probst v. City of New Orleans,* 325 So.2d 665 (4th Cir. La. 1976).

The following is language of the court below recognizing the Louisiana position:

> We make no argument with plaintiffs' foundational principle that "if both the standard of true value and the uniformity and equality required by law cannot be achieved, equality and uniformity is preferred under the law." *Sioux City Bridge Company v. Dakota County, Neb.,* 260 U.S. 441, 43 S.Ct. 190, 67 L.Ed. 340 (1923); *Probst v. City of New Orleans,* 337 So.2d 1081 (La. 1976); *Bussie v. Long,* 286 So.2d 689 (La. App. 1st Cir. 1973), writ denied, 288 So.2d 354 (La. 1974).

Westminister Management Corp. v. Mitchell, 525 So.2d 1171, 1173 (La. App. 4th Cir. 1988).

PLAIN, ADEQUATE AND COMPLETE REMEDY

Unlike the West Virginia cases, this case has not reached the point of judicial determination of whether there has been deliberate and intentional misapplication of the assessment process. It has ended on a procedural note, and the validity of this conclusion is the issue now presented. After reviewing the legislation and the cases interpreting it, and of course the Louisiana constitutional provisions, the petitioners in this case alleged as follows:

> In any event, in 1986, the Assessor for the First District, Mr. Kenneth Carter, generally applying recognized appraisal procedures with

reasonable uniformity, reappraised all of the major office buildings located in the Central Business District. A substantial protion of the remaining real property in and for his Assessment District was reappraised by Mr. Carter with the assistance of the Louisiana Tax Commission. Plaintiffs allege on information and belief that the Assessors for some or all of the other Assessment Districts failed to request the assistance of the Louisiana Tax Commission to aid in the reappraisal of the real property in and for their respective Assessment Districts. The Assessors for some or all of the other Assessment Districts failed to apply generally recognized appraisal procedures on uniform basis and systematically and intentionally undervalued the real property in and for their respective Assessment Districts.

As a direct result of the systematic and intentional failure of some or all of the Assessors for the Second, Third, Fourth, Fifth, Sixth and Seventh Municipal Assessment Districts, to apply the proper appraisal procedures uniformly in order to determine the fair market value of real property in and for their respective Assessment Districts, a complete lack of uniformity resulted between the assessed valuations of the real property in the First District in relation to the assessed valuations of the real property in and for some or all of the other Assessment Districts, and a complete lack of uniformity resulted among the other Assessment Districts themselves.[9]

Based upon these allegations, they prayed for the folowing relief:

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[9]Petition, Appendix A, p. A-7.

> WHEREFORE, Plaintiffs pray that after due proceedings be had, there be judgment herein in favor of each Plaintiff and against Defendant, Paul C. Mitchell, Jr., Director of Finance of the City of New Orleans, ordering, adjudging and decreeing that the appraisal procedures and the enforcement thereof by the Assessors of the Second, Third, Fourth, Fifth, Sixth and Seventh Municipal Assessment Disticts of the City of New Orleans are unconstitutional in violation of Article VII, Section 18(A), Article VII, Section 18(B) of the Louisiana Constitution of 1974 and Article I, Section 3 of the Louisiana Constitution of 1974 and in contravention of the Equal Protection and Due Process Clauses of the United States Constitution, that is the Fourteenth Amendment of the Constitution of the United States, and further ordering and directing the refund by Defendant to each Plaintiff of the full amount of the protested payment set forth opposite the name of each Plaintiff on Exhibit "A" or such amount as may be found due together with interest at the rate of two (2%) percent per annum from the date of payment under protest by such plaintiff until paid, plus all costs of these proceedings and for all general and equitable relief.[10]

This suit so alleging was filed relying on the explicit language of La. R.S. 47:2110, that it provided a remedy by which a taxpayer could contest either the correctness or the legality of his taxes, and that all issues so raised could be determined pursuant to said statute. La. R.S. 47:2110 by its very language was clearly an attempt to meet the 'plain, adequate and complete' test.

Until a point in time (the decision in *Lowrey*) which

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[10] Petition, Appendix A, p. A-13.

occurred after this suit was filed, there appeared to be available in petitioners two roads to the judicial determination of both the correctness and legality of their ad valorem taxes: either via La. R.S. 47:1998 - an appeal from the Louisiana Tax Commission to the district court within thirty days of that decision, or via La. R.S. 47:2110 - the payment of their taxes under protest and notice of the intention to sue, and the institution of the suit within thirty days of the payment of these taxes.

The latter remedy by its own terms is in addition to La. R.S. 47:1998, and relying on that specific language, these petitioners instituted this suit. These statutes were the only avenues provided to enable an aggrieved ad valorem taxpayer to reach the courts for adjudication of their complaint.

Louisiana courts have held that there was no right to a declaratory judgment to establish the legality of the taxing process, but that La. R.S. 47:2110 was the proper remedy. In *Giraud v. City of New Orleans,* 359 So.2d 294, 296 (La. 1975), the Louisiana Supreme Court said:

> "With regard to the question of whether the declaratory judgment is an appropriate vehicle for bringing this claim, we agree with the trial court that the remedy provided by La. R.S. 47:2110 is the *exclusive* method for attacking the action of the taxing authorities here...."

However, the court below evaded this clear holding by deciding that La. R.S. 47:2110 applied to "non-correctness" issues only, and dismissed petitioners' action as one to establish the correctness of their asessments. Petitioners have contended that their's was not an attack on the *amount* of their asessment, i.e., nor its

correctness as determined by *petitioners' assessor,* but to the contrary, on the manner in which other assessors acted in not meeting prescribed assessment standards, so that as to petitioners, the *ad valorem* tax imposed on them was based on assessments which were not uniform and, therefore, illegal, null and void. Apparently the court below felt that since the result of the litigation would adjust petitioners' taxes pursuant to the holding of *Sioux City,* that it was therefore a correctness issue. In this connection, it is imperative to consider that both of these statutes, R.S. 47:1998 and R.S. 47:2110, require a payment of the taxes under protest and the escrow of the "*amount of taxes in conflict.*" From the outset, the petitioners contended that the total amount of the tax was in contest on the ground that the tax was null and void. In holding that the entire tax was in dispute, the Louisiana Court of Appeal for the Fourth Circuit recognized that this was a case where the petitioners were clearly contending that the taxes were illegal, and stated:

> "A fair reading of this pleading leaves no doubt whatsoever that the *entire* amount of property tax paid in 1987 is being disputed by relators not just the difference between their 1986 and 1987 tax bills. The suit challenges the validity of the entire assessment process as applied in the City of New Orleans, on both State and Federal constitutional grounds. The petition also alleges statutory deficiences in the millage adjustment procedures which taxing authorities are constitutionally required to conduct from time to time." (Emphasis ours)[11]

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[11] Appendix C., p. A-38. The Louisiana Supreme Court reversed, and held the amount in dispute, i.e., the amount to be held in escrow, was not the full amount of the taxes paid, but an amount which could not exceed the difference between the 1987 taxes and the prior year's taxes (1986).

Ignoring its opinion in the first *Westminster* case, pretermitting completely the language of *Giraud*, supra, another section of the same Court of Appeal in the decision below held:

> Thus, the pivotal issue is whether plaintiffs' challenge is for "correctness," Plaintiffs do not challenge the right of the State or any of its political subdivisions to obtain revenue by way of ad valorem taxation. Plaintiffs do not question the methods of enforcement of ad valorem taxes. Plaintiffs complain that their assessments are unequal and not uniform relative to assessments of similar classes of property in adjacent assessment districts. Plaintiffs' complaint is a "correctness" challenge.
>
> Plaintiffs argue that they are not challenging correctness - their assessments are correct, other assessments are incorrect, too low. Plaintiffs argue that their challenge is of constitutional magnitude resulting from inequality and non-uniformity, invoking the due process and equal protection clauses of the state and federal constitutions. . . .We find, however, that plaintiffs incorrectly construe this and other "constitutional" principles to argue that their challenge is not for "correctness." "Correctness" includes both the standard of true value and the uniformity and equaltiy required by law. The achievement of both is the goal, the absence of either creates incorrectness. That uniformity and equality are given higher priority than true value does not make an attack on the former rather than the latter something other than a challenge for "correctness."

> We do not find significant distinction between this case and *Lowrey Chevrolet, Inc. v. Brumley,* above.

Westminster Management Corporation v. Mitchell, supra.

In Churchill Farms v. Louisiana Tax Commission, 338 So.2d 963, 966 (La. App. 4th Cir. 1976), the Court forcefully expressed petitioners' position:

> No taxpayer should be put in the position of submitting and being taxed on a 100-percent valuation of his property when the prevalent practice is to pay tax on a significantly smaller value base set by the local assessor. Nor should he be denied a hearing on the excuse he failed to comply with a law that is universally ignored. This effectively deprives him of his day in court. Thus if we limit 47:2110 to a situation attacking the law itself rather than interpreting it to include an attack on unconstitutional methods of enforcement (assessment), we sanction an unconstitutional taking of property without due process because we would in effect say the taxpayer's only remedy is that specified in 47:1998.
>
> Therefore, we conclude the language of 47:2110 gave a taxpayer the right to question not only the validity of the law itself but also the constitutionality of the administration of a valid tax law. The plaintiff's petition does state a cause of action.

Petitioners' action is clearly one for determination of non-correctness, that is, legality of assessment procedures, for these reasons:

1. In petitioners' complaint, it is clear that they do not contest the "correctness" of the assessment imposed by their own assessor, but in fact alleged that it was apparently correct.

2. The relief which they seek is the determination that the tax structure requiring an appraisal at fair market value and an assessment at an appropriate percentage of this amount, was administered in such a manner by the assessors other than petitioner's that it violates the basic principles of equality under the law, and that, therefore, their taxes were illegal, null and void — thus, until the tax system was correctly applied, petitioners were entitled to the relief which this court had declared in *Sioux City, supra.*

3. Both statutes provide a procedure to test the validity of the application of the tax statutes and require declaration of an amount in contest, so that the appropriate amount of taxes could be held in escrow pending a determination of the dispute. This is not determinative that an action is one for correctness.

4. This case raises a Fourteenth Amendment question and Article VII of the Louisiana Constitution question, and that by it, these petitioners, representing a substantial element of the taxing community, seek a "legal" solution to their problem rather than a monetary determination of the correctness of their assessment.

PROVISION OF A PLAIN, ADEQUATE AND COMPLETE REMEDY

This Court, in *Great Lakes Dredge & Dock Co. v. Huffman,* 319 U.S. 293 (1943), has clearly held that La. R.S. 47:2110 provides such a clear, adequate and speedy

remedy. In this connection, the court said:

> Without raising that issue here we pass at once to the question, submitted to counsel, whether the declaratory judgment procedure may be appropriately resorted to in the circumstances of this case.
>
> In answering it the nature of the remedy afforded to taxpayers by state law for the illegal exaction of the tax is of importance. Section 18 of Article 10 of the Constitution of Louisiana of 1921 directs that: "The Legislature shall provide against the issuance of process to restrain the collection of any tax and for a complete and adequate remedy for the prompt recovery by every taxpayer of any illegal tax paid by him." Act 330 of 1938, sets up a complete statutory scheme to carry into effect the constitutional provision . . .[12/]

Can the remedy be *clear* when the decision below is diametrically different from prior Louisiana Supreme Court and Court of Appeal decisions, and a decision of this Court that the statute relied upon provided the appropriate remedy?

Assuming for the purpose of argument only, this is a "correctness" action, the decision below is neverthless wrong. La. R.S. 47:1998 and La. R.S. 47:2110 both provide a remedy for correctness. The supplemental and amended petition filed in this case clearly alleges that petitioners appealed to the Board of Review and to the Louisiana Tax Commission and petitioners supported this allegation by

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12/ Act 330 of 1938 is codified as Revised Statutes Title 47, Section 2110.

filing copies of the respective decisions of those two administrative bodies, each of which, in their own inimitable way, recognized that petitioners' 'equal protection of the law' contention was valid, and the Louisiana Tax Commission went so far as to say that while they would take action to determine this, they would not give any relief because the petitioners did not sustain an undefined and unprovided "burden of proof"; before them.[13]

Regardless of the approach to the basic premises of this lawsuit, whether correctness or non-correctness, at the time the suit was filed, both statutes were available to the petitioners. It was not until *Lowrey* that any court had held that the exclusive remedy for "correctness" was an appeal from the Louisiana Tax Commission decision, and this despite the clear unequivocal language of La. R.S. 47:2110 providing that it was an additional remedy to La. R.S. 47:1998 for either correctness or illegality.

Lowrey is not prima facie, but conclusive proof that the remedy provided by Louisiana *was not clear,* and *was not complete.* If it took this decision of *Lowrey* after all of the past litigation to recognize the exclusiveness of R.S. 47:1998 as the only remedy of correctness, it was obviously not a "clear" remedy, and inasmuch as Louisiana Constitution Article VII, section 18(E) relates to "correctness" and R.S. 47:1998 is to apply to correctness, it is not a *complete* remedy because it took the legislature in R.S. 47:2110 to enable the courts to decide all issues relating to taxes whereas R.S. 47:1998 could not reach to this extent.

Thus, *Lowrey* alone stands as evidence that Louisiana had not provided its taxpayers with a clear and complete remedy.

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13 Amended Petition, Appendix B, pages A-30 and A-33.

But reliance on *Lowrey* goes beyond the correctness — illegality question, and applied to this existing case, based upon statutes which must be construed as constitutional until declared otherwise, is a retroactive application of a procedural requirement, which by causing the dismissal of this suit, we contend, deprives petitioners of due process of law.

The retroactive application of a decision in cases such as this has been reprobated by both state and federal jurisprudence.

In *Chevron Oil Company v. Huson*, 404 U.S. 97 (1971), this court stated that in determining whether a decision should be applied retroactively, three separate factors should be considered:

First, the decision should not have retroactive application if it establishes a new principle of law, either by overruling a clear past precedent on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

Second, a court must weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further retard its operation.

Third, a court must weigh the inequity imposed by retroactive application, for '[w]here a decision of this court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretro-

activity." (404 U.S. 97, 106 - 107).

After *Chevron,* this court decided *Rodrigue v. Aetna Casualty & Surety Company,* 395 U.S. 352 (1969). It was held that a state law applied to fixed structures in the Outer Continental Shelf under the Outer Continental Shelf Land Act. Under *Rodrigue,* the action would have prescribed by Louisiana's one year statute of limitation for personal injuries. However, the *Chevron* decision held that the decision in *Rodrigue* should not be applied to retroactively. The *Chevron* court in reaching its decision said:

> "It cannot be assumed that he did or could foresee that this consistent interpretation of the Lands Act would be overturned. The most he could do was rely on the law as it then was."

Clearly its reasoning applies to this case. The plaintiff relied on the clear and consistent interpretation of La. R.S. 47:2110 as approved by Louisiana courts in *Giraud, supra,* as well as in *Churchill Farms, Inc. v. Louisiana Tax Commission, supra.* We urge that the same principles be applied in this matter as were applied in *Chevron* for the reason that any other result". . .would produce the most 'substantial inequitable results' . . ." *Cipriano v. City of Houma,* 395 U.S. 701 (1969). To hold that the petitioners here have lost the right to pursue this claim because of a hypertechnical procedural error not reasonably foreseeable under the then existing statutory scheme or jurisprudence would certainly cause grievous injusice.

CONCLUSION

Petitioners urge that this court should grant its writs for the reason that serious constitutional rights are involved and serious constitutional issues are herein presented.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing has been served on the Solicitor General of the United States, The Attorney General of the State of Louisiana, and all counsel of record in this proceeding by depositing a copy of same, duly addressed to each of them, in the United States Mail, First Class, postage prepaid, this 29th day of December, 1988.

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